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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 542

JAMES ELLIS DANIEL, JR.,
Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent.

PETITION
In Opposition to Granting Writ of Certiorari to the Supreme Court of Alabama

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	2
Statement of the case	3
Reasons for denying the writ	4
Conclusion	11

Cases Cited

Cole v. Arkansas, 338 U. S. 345, 94 L. Ed. 155, 70 S. Ct. 172	9
Feiner v. State of New York, 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 267	7-8
Gregory v. City of Chicago, 394 U. S. 111, 89 S. Ct. 946	9
Landry v. Daley, 280 F. Supp. 938, appeal dismissed, 89 S. Ct. 455, 393 U. S. 220, 21 L. Ed. 2d 392	8
Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 197 L. Ed. 1105	5
Western Union Telegraph Co. v. Priester, 276 U. S. 252, 48 S. Ct. 234	4
Wilson v. Schnettler, 365 U. S. 381, 81 S. Ct. 632, 5 L. Ed. 2d 620	5-6

Statutes Cited

Constitution of the United States:
First Amendment 8
General Code of the City of Birmingham:
Section 1-5 10
Section 14-13 .....2, 5, 7, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 932

JAMES ELLIS BAINES, JR.,
Petitioner,

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent.

PETITION

In Opposition to Granting Writ of Certiorari to the Supreme Court of Alabama

OPINION BELOW

The Opinion of the Court of Criminal Appeals of Alabama referred to in Petitioner's brief is reported as **James Ellis Baines, Jr. v. City of Birmingham**, 238 So. 2d 352, **certiorari denied by the Supreme Court of Alabama**, 238 So. 2d 356.

The copy of the Opinion set out in Petitioner's brief at pages 1a to 9a is not correct in that pages 5a and 6a have been transposed.

JURISDICTION

The petition should have been for a writ of certiorari to the Court of Criminal Appeals of Alabama instead of to the Supreme Court of Alabama.

QUESTIONS PRESENTED

The questions posed in the Petitioner's brief under the heading "Questions Presented" are not supported by the record in this case. They completely ignore the existence of an unlawful assemblage involving violence upon a public park on the occasion involved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The section of the General Code of the City of Birmingham involved in this case is Section 14-13, which is as follows:

> "Sec. 14-13. Authority to prohibit use of public places when disorder threatened.
>
> Whenever the chief of police has good reason to believe that an unlawful assembly on a street or in a public place is in progress or is planned to be held, the chief of police, if he has good reason to believe that it is necessary to prevent a breach of the peace, a disorder or a riot, may prohibit, for the time being, persons from occupying or passing on any street or public place where such breach of the peace, disorder or riot is threatened or is believed by the chief of police likely to occur, and to otherwise regulate passage or occupancy upon such street and place.
>
> The chief of police or, in his absence, the officer mentioned in section 14-16, may deputize any mem-

ber of the police department to impose the prohibitions or regulations upon occupying or passing on streets or public places hereinabove provided for. No person, after being duly informed of such prohibition or regulation, shall wilfully and intentionally, without lawful excuse, attempt to go after being warned not to do so, or remain on any such street or public place and fail to depart after being warned to do so."

STATEMENT OF THE CASE

Facts

The Petitioner in the "facts" set out under Statement of the Case in his brief fails to give this Court a true picture of the facts as shown by the Record. The Record shows that the Petitioner and his group of from fifty to sixty persons appeared in Woodrow Wilson Park in the City of Birmingham at about 2:00 P. M. on September 10, 1967 (R. 83). Lt. R. J. Long, the police officer in charge of the Police Department after 3:00 P. M. on said date, arrived at the Park about 3:00 P. M. and found two or three hundred people, including the Petitioner, assembled at the flag pole (R. 16, 17). At this time there was some "pushing and shoving from both sides" (R. 20). The Petitioner in his speech to the people present referred to "the fighting men over there (Vietnam) as murderers" (R. 24). The Petitioner threatened a group of teenage boys with a club which he had with him saying "he would bash their heads in with that club" (R. 27). There were continued threats directed from one group to the other with the crowd getting larger (R. 28). There was about to be trouble between the two groups (R. 32), Lt. Long asked the crowd there that was not a part of the Petitioner's group to leave because of the "tense situation" and that he would "appreciate their cooperation to leave" (R. 37). As a result of this request, "most

of them left" (R. 38). However, the Petitioner endeavored to get the crowd to disregard the request (R. 38). Later in the afternoon a larger crowd gathered around and a Mr. Walker, a part of the Petitioner's group, "came down off the stand taking his jacket off to fight some of the group" (R. 38). At this point, Lt. Long by use of a bullhorn or loud speaker informed all the people there that it was "no longer a peaceful assembly" and they would have to leave (R. 32, 38). Most of the people left and all who did not leave were arrested (R. 32, 33). The Petitioner refused to leave and was arrested (R. 32, 33). The Petitioner was arrested at 5:15 P. M. (R. 59).

On page 5 of Petitioner's brief appears a statement that is incorrect, which statement is that, "At one point Lt. Long, using a bullhorn, 'asked' everyone not a part of the war protestors' gathering to leave the park. No one left but no one was arrested (R. 50)." Not on page 50 of the Record, nor anywhere else in the Record, is there any testimony that on the occasion referred to "no one left . . .". To the contrary, it is clear from the Record that after Lt. Long's request referred to by the Petitioner "most of them left" and it was not until later that a larger crowd gathered (R. 38).

REASONS FOR DENYING THE WRIT

I

The Petition should be dismissed since it is a petition for a writ of certiorari to the Supreme Court of Alabama. The Supreme Court of Alabama denied the petition for certiorari in this case without opinion. The Petition should have been for a writ of certiorari to the Court of Criminal Appeals of Alabama and not the Supreme Court of Alabama. **Western Union Telegraph Co. v. Priester,** 276 U. S. 252, 48 S. Ct. 234.

II

The Petitioner has completely ignored the bedrock of Section 14-13 of the City Code. He has completely ignored the fundamental condition precedent to **any** application of this section.

This section is designed to protect the public against **unlawful assemblies.** It has no application to **lawful assemblies.** It has no application unless an **unlawful assembly is in progress** or is **planned to be held.**

The facts in this case show so clearly that the Petitioner himself and others in his group by their own acts made what could have been a lawful assembly into an **unlawful assembly.** Apparently for this reason the Petitioner is compelled to take the position that the Ordinance be judged not as applied to the facts and circumstances of his arrest but as to its validity vel non.

We respectfully submit that the Ordinance is not unconstitutional or invalid on its face or as applied in this case.

It will apply only when an unlawful assembly **is in progress** or **is planned to be held.** The decision as to whether or not an unlawful assembly **is in progress at a particular place** or **is planned to be held at a particular place** may be made under the Ordinance only by the top law enforcement officer of the City, the Chief of Police, or in his absence the officer in command of headquarters. Considering the Ordinance on its face alone, it must be assumed that its application will be called into play only in the event an unlawful assembly is in progress, or based on good reason is determined by the Chief of Police to be planned. This Court has held that it must be assumed that municipal and other public officials will act within constitutional limitations. **Poulos v. State of New Hampshire,** 345 U. S. 395, 73 S. Ct. 760, 197 L. Ed. 1105; **Wilson v.**

Schnettler, 365 U. S. 381, 81 S. Ct. 632, 5 L. Ed. 2d 620. Surely the Petitioner does not contend that a municipality is powerless to disperse an unlawful assembly involving violence actually in progress. The First Amendment does not protect unlawful assemblies. Section 14-13 relates only to unlawful assemblies involving violence.

The Petitioner complains of that provision of the Ordinance which permits the Chief of Police to temporarily regulate passage or occupancy upon a street or public place where he has good reason to believe that an unlawful assembly involving violence **is planned to be held**. If the Petitioner's argument in this respect is valid, it would mean that a municipality or its municipal officials must expose persons who may be travelling upon the streets or in public places to the hazard of actual disorder and violence before the municipality may act.

The phrase "unlawful assembly . . . is planned to be held" does not include and has not been applied so as to include an otherwise lawful assembly. The fact that a group of people are presenting or discussing in a peaceful way an unpopular position or argument upon a public place and are being heckled or threatened by spectators does not, without more, constitute an unlawful assembly. The facts in this case showed that the Lieutenant, the Acting Chief of Police at the time, did not construe the Ordinance as applicable to a peaceable assembly. The method of presentation of their position by the Petitioner and his group, such as calling United States Soldiers in Vietnam murderers, speaking favorably of North Vietnam and Ho Chi Minh (R. 24, R. 37), and similar statements, could only inflame many people who are loyal to this Nation or who have been bereaved because members of their family or close friends have been killed or wounded in Vietnam while performing their duty to this Country. But it is clear from said Section 14-13, and it was clear to Lt. Long on September 10, 1967 that such a presenta-

tion, no matter how intemperate, is not proscribed by the ordinance.

Heckling and even threats from spectators do not transform an otherwise peaceful assembly into a disorderly assembly. In this case, the Acting Police Chief was fully aware of such. During the period of time the Petitioner and his group were in the Park making speeches (from 2:00 P. M. to 5:15 P. M. on September 10, 1967), the Petitioner was heckled at times by some of the spectators and even threatened. However, the police were there from 3:00 P. M. to 5:15 P. M. and prevented any overt act of violence by the spectators during that time. They did protect the Petitioner and his group from violence of any sort. At one time, when the feelings of the spectators was running high, the Lieutenant persuaded most of the hecklers to leave. After this the crowd quieted down. At another time, when trouble appeared to be imminent, the Lieutenant suggested to two uniformed servicemen that they not get into the situation and they left (R. 69).

It was not until one of Petitioner's group removed his jacket, came down off the stand to fight, and Petitioner himself threatened to bash in the heads of some of the spectators with a club he had in his hand, that Lt. Long declared that the assembly had then become an unlawful assembly within the meaning of the Ordinance. This was some three hours after the assembly had begun. It was transformed from a lawful assembly into an unlawful assembly by the deliberate acts of the Petitioner and his group. It is apparent that had the Petitioner and his group not by their own violent acts and threats transformed the assembly into an unlawful assembly, there would have been no field for the operation of Section 14-13 of the City Code, and it would not have been applied.

The Petitioner lost his constitutional protection under the First Amendment when he and members of his group threatened to and attempted to engage in violence. **Feiner**

v. State of New York, 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 267.

In **Landry v. Daley**, 280 F. Supp. 938 (a three-judge court), appeal dismissed, 89 S. Ct. 455, 393 U. S. 220, 21 L. Ed. 2d 392, the Court said:

> "Demonstrations will sometimes, however, conflict with various other legitimate state intergsts. In such instances, their societal value must be subordinated to other values and considerations. Perhaps the most important countervailing consideration is the state's interest in preventing physical violence or abuse of property. Thus, demonstrations lose their constitutional protection if the participants engage in violence. And, under certain circumstances, conduct short of violence may also subject demonstrators to arrest or dispersal. For instance, provocative conduct or language which undertakes incitement to riot may also lead to loss of constitutional protection."

III

That regulating or prohibiting unlawful assemblies is not constitutionally proscribed is self-evident from the words of the First Amendment of the United States Constitution quoted below.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

This Amendment secures to the people the right to peaceably assemble but not to engage in an unlawful assembly involving violence or fraught with the danger of violence.

In **Cole v. Arkansas**, 338 U. S. 345, 94 L. Ed. 155, 70 S. Ct. 172, this Court held that it is no abridgment of free speech or assembly to make criminal the promoting, encouraging, and aiding of an assembly, the purpose of which is to wreak violence. Also, this Court concluded that the statute (Section 2 of Act 193, Acts of Arkansas 1943) was not unconstitutionally vague.

In **Gregory v. City of Chicago**, 394 U. S. 111, 89 S. Ct. 946, Mr. Justice Black in his concurring opinion said:

> "I, of course, do not mean to say or even to intimate that freedom of speech, press, assembly, or petition can be abridged so long as the First Amendment remains unchanged in our Constitution. But to say that the First Amendment grants those broad rights free from any exercise of governmental power to regulate conduct, as distinguished from speech, press, assembly, or petition, would subject all the people of the Nation to the uncontrollable whim and arrogance of speakers, and writers, and protesters, and grievance bearers. As Mr. Justice Goldberg wrote for the Court in Cox v. Louisiana, 379 U. S. 536, 554, 85 S. Ct. 453, 464 (1965):
>
> > 'The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.'
>
> "Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits

of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past."

IV

The assembly engaged in by the Petitioner was not affected by any prior restraint. He was ordered to disperse under that portion of the Ordinance which relates to an unlawful assembly **actually in progress.**

We respectfully submit that if that provision of Section 14-13 relating to an unlawful assembly **which is planned but not actually in progress** is subject to any constitutional infirmity, such is not available to the Petitioner since said provision of said Section 14-13 was not applied to him and since the provisions of the City Code are severable. In this respect, Section 1-5 of the City Code is as follows:

"Sec. 1-5. Severability of parts of Code.

It is hereby declared to be the intention of the city council that the sections, paragraphs, sentences, clauses and phrases of this Code are severable, and if any phrase, clause, sentence, paragraph or section of this Code shall be declared unconstitutional or otherwise invalid by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Code, since the same would have been enacted by the city council without the incorporation in this Code of any such unconstitutional or invalid phrase, clause, sentence, paragraph or section."

V

The Petitioner on page 11 of his brief apparently hopes to bolster his weak factual position by making a completely and absolutely false statement, designed for what

purpose we hesitate to guess, that ". . . Birmingham, perhaps more than other communities, needs the free and unfettered exchange of ideas and beliefs . . ." If the Petitioner is attempting to rely on matters dehors the record in this case, he overlooked the fact that there was no restriction on a free and unfettered exchange of ideas by the Petitioner and others on September 10, 1967 for a period of over three hours, either before or after the arrival of the police. He also overlooked the fact that he and groups promoting arguments similar to the arguments advanced by him on said date, and just as unpopular, have on numerous occasions held peaceful demonstrations in the City and received police protection against attack (although on said occasions the demonstrators themselves did not engage in violence). We resent, reject and deny this overbroad, unsupported and false statement and implication advanced by the Petitioner on page 11 of his brief, and respectfully ask this Court to disregard it.

CONCLUSION

For the reasons set out hereinabove, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted

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